

**OPINION
67-52**

November 14, 1967 (OPINION)

Mr. Eugene Kruger

State's Attorney

Cass County

RE: Counties - Public Contracts - Buy-back Bids

This is in reply to your letter with regard to use in bidding on public contracts of what you inform us is know as a "buy-back" bid. You state that such bids "* * * * call for a formula which starts with the sale price and to it is added the guaranteed cost of maximum repairs and from the total of these amounts they subtract the guaranteed minimum repurchase price to arrive at a final figure to determine who is the successful bidder." You enclose a copy of an opinion of the Minnesota Attorney General considering the application of the Minnesota law to such type of bidding. You further state that you anticipate that this question will again arise at your governmental level and you respectfully request our opinion as to the legality of this type of bidding.

We do appreciate your forwarding a copy of the opinion of the Minnesota Attorney General, and we note with interest the reasoning of the Minnesota Supreme Court in the cases he cites.

We presume the questions you anticipate would arise in contracts let pursuant to sections 24-05-04 and 11-11-27 of the North Dakota Century Code which provide, insofar as here directly applicable, as follows:

24-05-04. CONTRACTS TO BE ADVERTISED - REQUIREMENTS FOR RENTAL CONTRACTS. All purchases of county road machinery and all rental contracts or agreements for the use of road machinery and other articles or contracts for the improvement of the highways, except necessary repairs for such road machinery, which shall exceed the sum of one thousand dollars, shall be advertised in the manner provided by law for the purchase of county supplies. * * * *."

11-11-27. CONTENTS OF ADVERTISEMENT - WHEN BIDS MAY BE OPENED - LOWEST BIDDER ACCEPTED. * * * *The bid of the lowest responsible bidder shall be accepted, but the board shall have power to reject any or all bids."

Determining who is the "lowest responsible bidder" is not an automatic function. The Supreme Court of this state in Chaffee v. Crowley, 49 N.D. 111, 190 N.W. 308, informs us at page 114 of the North Dakota Reports that:

Concerning such contracts, the law provides that the lowest responsible bid must, in all cases, be accepted. Chapter 49, Laws of 1921. It is well recognized that a responsible bid

involves the elements of the ability, capacity, reputation, experience, and efficiency of the bidders. Responsibility must be determined as well as the pecuniary amount. 36 Cyc 876; Butler v. Darst, 38 L.R.A. (N.S.) 65, note. The county commissioners have a discretion to exercise in this regard.
* * * *."

Likewise our Supreme Court informs us in Ellingson v. Cherry Lake School District, 55 N.D. 141, 212 N.W. 773, at page 148, of the North Dakota Reports:

The very terms of the statute imply that a school board or other governing body shall determine the responsibility of the several bidders and award the contract to the one found to be the lowest responsible bidder. The term 'responsible,' as used in the statute, means something more than mere financial responsibility. It means responsibility as regards the duty to be assumed by the contractor by the particular contract under consideration and includes all the various elements that bear on that question, such as the integrity of the bidder and his skill, ability and capacity to perform that particular work.
* * * *."

The Minnesota cases cited in the opinion you forwarded also go at some length into distinguishing between the types of machines offered in making a similar determination.

On these bases alone it seems difficult to reduce the determination of the decree of responsibility down to a simple mathematical formula, i.e., that a given price for a machine plus a guarantee of maximum repair costs, less guaranteed minimum repurchase price equals full cost to the county. The Minnesota opinion does go into the fact that these repair costs may be a variable factor possibly below the maximum guarantee; also, of course, whether the repurchase feature would be taken advantage of or not might well be a determination to be made by future rather than the present board of county commissioners. Likewise problems of enforcing a particular guarantee, or of the likelihood of a given type of machine being more liable to require repairs, or a given amount of repair, as well as the adaptability of a given type of machine to a particular type of project, should necessarily enter into the determination of the board of county commissioners.

Except to the extent that the transaction completed under such specification would possibly constitute a "rental contract or agreement for the use of road machinery and other articles for a longer period than twelve months from the date of such rental contract or agree to pay rental for the use of road machinery and other articles which would result in the lessor receiving rental at a rate in excess of twenty per centum per annum of the cash sale price thereof, which cash sale price of such road machinery and other articles shall be clearly set forth in all such rental contracts" as prohibited by section 24-05-05 of the North Dakota Century Code, we would hesitate to suggest that such a specification could not be considered by the board of county commissioners; however, their final determination in any given instance would have to be to accept the bid of the lowest responsible bidder, or reject any or all bids, as

specified in the above quoted provision of section 11-11-27 of the North Dakota Century Code.

HELGI JOHANNESON

Attorney General